

\*E-Filed: October 16, 2013\*

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

SHERRY MELINDA VINCENT,

No. C13-01569 HRL

Plaintiff,

v.

**ORDER (1) GRANTING  
DEFENDANTS' MOTION TO  
DISMISS AND (2) STRIKING NEWLY  
ADDED ATTORNEY DEFENDANTS**

COUNTRYWIDE dba BANK OF  
AMERICA, THE BANK OF NEW YORK  
MELLON N.A. and RECON TRUST  
COMPANY N.A., REEDSMITH LLP  
ATTORNEY SHAUDEE NAVID,

**[Re: Docket No. 24]**

Defendants.

Plaintiff Sherry Melinda Vincent sues defendants for alleged violations of state and federal law in connection with her mortgage loan.<sup>1</sup> At the hearing on defendants' first motion to dismiss, the Court indicated it would grant the motion and that the plaintiff would be given leave to amend within 30 days of the forthcoming written order. However, prior to the issuance of the order, plaintiff filed an amended complaint which, while nearly identical to the initial complaint in substance, attached over 100 pages of new exhibits. The first motion to dismiss was denied as moot, and the defendants now move to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) and request judicial notice of documents in support thereof. Plaintiff opposes the motion.

<sup>1</sup> Defendants identify themselves as: Bank of America, N.A. (erroneously sued as "Countrywide dba Bank of America"); The Bank of New York Mellon, f/k/a The Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2006-OA16, Mortgage Pass-Through Certificates, Series 2006-OA16 (erroneously sued as "The Bank of New York Mellon, N.A."), ReconTrust Company, N.A., Reed Smith LLP, and Shaudee Navid.

1 All parties have expressly consented that all proceedings in this matter may be heard and finally  
2 adjudicated by the undersigned. 28 U.S.C. § 636(c); Fed. R. Civ. P. 73. Upon consideration of the  
3 moving and responding papers,<sup>2</sup> the Court grants the motion to dismiss without leave to amend.

#### 4 BACKGROUND

5 In July 2006, defendants agreed to loan the plaintiff \$634,010.78 in “lawful money of the  
6 United States.” Amended Common Law Complaint (“ACLC”), Dkt. 23, at ¶ 3. Plaintiff signed  
7 mortgage documents and defendants wrote plaintiff a check for the sum of \$634,010.78. *Id.* at ¶¶ 6-  
8 7. However, plaintiff alleges that defendants only provided an estimated 5% of the loan’s face value  
9 in actual money. *Id.* In her reply, plaintiff clarifies that the actual amount loaned was not greater  
10 than 10% of the face value because that percentage is the reserve ratio that the bank is required to  
11 keep. Affidavit, Dkt. 30, ¶ 4. The rest of the money for the loan was created by the bank itself  
12 through a series of book entries. ACLC at ¶10. Thus, plaintiff concludes, the check was not backed  
13 by “lawful money of the United States,” and consequently, defendants have breached the loan  
14 agreement, committed fraud and racketeering, and violated usury laws and the Truth in Lending Act  
15 (“TILA”).

#### 16 LEGAL STANDARD

17 A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) tests the  
18 legal sufficiency of the claims in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.  
19 2001). Dismissal is appropriate where there is no cognizable legal theory or an absence of sufficient  
20 facts alleged to support a cognizable legal theory. *Id.* (citing *Balistreri v. Pacifica Police Dep’t*, 901  
21 F.2d 696, 699 (9th Cir. 1990)). In such a motion, all material allegations in the complaint must be  
22 taken as true and construed in the light most favorable to the claimant. *Id.* However, “[t]hreadbare  
23 recitals of the elements of a cause of action, supported by mere conclusory statements, do not  
24 suffice.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Moreover, “the court is not required to  
25 accept legal conclusions cast in the form of factual allegations if those conclusions cannot  
26 reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-

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27  
28 <sup>2</sup> Long after her opposition was due, Plaintiff filed an affidavit which defendants interpreted as an  
untimely response to its motion and replied accordingly. The Court interprets it the same and  
considers both papers. Plaintiff did not appear at the motion hearing.

1 55 (9th Cir. 1994).

2 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the  
3 claim showing that the pleader is entitled to relief.” This means that the “[f]actual allegations must  
4 be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550  
5 U.S. 544, 555 (2007). However, only plausible claims for relief will survive a motion to dismiss.  
6 *Iqbal*, 129 S. Ct. at 1950. A claim is plausible if its factual content permits the court to draw a  
7 reasonable inference that the defendant is liable for the alleged misconduct. *Id.* A plaintiff does not  
8 have to provide detailed facts, but the pleading must include “more than an unadorned, the-  
9 defendant-unlawfully-harmed-me accusation.” *Id.* at 1949.

10 Documents appended to the complaint or which properly are the subject of judicial notice  
11 may be considered along with the complaint when deciding a Fed. R. Civ. P. 12(b)(6) motion. *See*  
12 *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990);  
13 *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

14 While leave to amend generally is granted liberally, the court has discretion to dismiss a  
15 claim without leave to amend if amendment would be futile. *Rivera v. BAC Home Loans Servicing,*  
16 *L.P.*, 756 F. Supp. 2d 1193, 1997 (N.D. Cal. 2010) (citing *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir.  
17 1996)).

## 18 DISCUSSION

19 The basis for all of plaintiff’s claims is that the loan was not backed by “lawful money of the  
20 United States.” Defendants argue that this is not a cognizable legal theory and point out that it has  
21 been rejected by numerous district courts. *See, e.g., Rene v. Citibank NA*, 32 F. Supp. 2d 539  
22 (E.D.N.Y. 1999) (dismissing claims of breach of contract, wire and mail fraud, and violation of  
23 usury laws and plaintiff’s civil rights based on the theory that the check drawn to them was not  
24 backed by legal tender due to inadequate funds in defendant’s vault, and noting rejection of theory  
25 by several other courts).

26 The sole authority plaintiff relies on to support her theory is *First Nat’l Bank of Montgomery*  
27 *v. Jerome Daly* (1968). However, it has absolutely no precedential value as it is an unreported  
28 decision of a Minnesota Justice of the Peace that was vacated by the Minnesota Supreme Court.

1 *Sneed v. Chase Home Finance*, No. 07-cv-00729, 2007 WL 1851674 (S.D. Cal.) (admonishing  
2 plaintiff about its reliance on the case and warning that further frivolous arguments relying on it or  
3 any other opinion of the Justice of the Peace purporting to question the validity of the federal  
4 monetary system would result in sanctions).<sup>3</sup>

5 Plaintiff's underlying legal theory has been consistently rejected, and this Court likewise  
6 rejects it. The invalidity of her theory is fatal to each of her claims for relief, and none are  
7 salvageable by pleading additional facts.

8 1. Breach of Contract

9 Plaintiff alleges that defendants breached the loan agreement by failing to lend plaintiff  
10 lawful money. But, plaintiff admits that they tendered a check for the face value of the loan, and the  
11 Court rejects plaintiff's allegation that the check was not backed by lawful money of the United  
12 States as required by the agreement. Thus, plaintiff's claim for breach of contract is dismissed  
13 without leave to amend.

14 2. Fraud and Racketeering

15 Plaintiff alleges that defendants "are in collusion in using US Mail[] and Wire Services to  
16 collect on this unlawful debt . . . in establishing a 'pattern of racketeering activity.'" ACLC at  
17 "Count Two" ¶ 1. However, the debt on which defendants were collecting was not unlawful for  
18 reasons alleged by plaintiff. Additionally, no fraud occurred because the defendants' statement that  
19 they would provide plaintiff with lawful money was not a misrepresentation. Accordingly,  
20 plaintiff's claim for fraud and racketeering is dismissed without leave to amend.

21 3. Usury

22 Plaintiff alleges that because only 5% (or 1/20th) of the loan was in lawful money, by  
23 charging interest on the full amount, defendants charged interest 20 times greater than provided in  
24 the note, which violates unspecified usury laws. Again, the Court does not accept plaintiff's theory  
25 that the loan was not lawful money, and therefore plaintiff's allegation that defendant charged

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26 <sup>3</sup> Further discrediting the opinion, both the Justice of the Peace, Martin V. Mahoney, and the  
27 defendant Jerome Daly, a "lawyer, whose unreachable quest is a judicial decree of  
28 unconstitutionality of the federal income tax and the federal reserve and monetary system," *Koll v.*  
*Wayzata State Bank*, 397 F.2d 124, 125 (8th Cir. 1968), were the subjects of prohibition and  
contempt proceedings in the Minnesota Supreme Court for their conduct in connection with the  
case. *Sneed*, 2007 WL 1851674 at \*3, n.4.

1 interest greater than provided in the loan fails. Plaintiff's claim for violation of usury laws is  
2 dismissed without leave to amend.

3 4. Truth In Lending Act (TILA)<sup>4</sup>

4 Plaintiff alleges that defendants failed to disclose material facts in violation of TILA. The  
5 undisclosed material facts are that "Plaintiff was the depositor and that the Defendant(s) risked none  
6 of their assets in the exchange, or any assets of other depositors." Not only does plaintiff fail to  
7 adequately explain her conclusory assertion that such disclosures are material within the meaning of  
8 TILA, but again the claim hinges on plaintiff's theory that defendants did not provide, or "risk,"  
9 lawful money. Accordingly, plaintiff's claim for TILA violations is dismissed without leave to  
10 amend.

11 5. Defendants Reed Smith LLP and Attorney Shaudee Navid

12 Plaintiff's amended complaint added two new defendants. However, as plaintiff did not  
13 have leave of the Court to add new defendants or claims, Reed Smith LLP and Attorney Shaudee  
14 Navid are stricken from the amended complaint, as are any claims asserted against them.

15 CONCLUSION

16 The amended complaint fails to state a claim for relief and cannot be further amended to  
17 state one under the theory plaintiff insists on pursuing. It is therefore dismissed without leave to  
18 amend.<sup>5</sup> The clerk shall close the file.

19 **IT IS SO ORDERED.**

20 Dated: October 16, 2013

21 HOWARD R. LLOYD  
22 UNITED STATES MAGISTRATE JUDGE

23 <sup>4</sup> In support of this claim, plaintiff directs the Court to see exhibits/attachments, which is roughly  
24 100 pages, including an article entitled "Securitization is Illegal," an unsourced Memorandum of  
25 Law – Bank Fraud," and the affidavit of an expert witness from a Michigan state court case. These  
26 documents are not properly incorporated by reference pursuant to Fed. R. Civ. Proc. 10(c) and are  
27 not considered. See *Dichter-Mad Family Partners, LLP v. U.S.*, 707 F. Supp. 2d 1016, 1019 (C.D.  
28 Cal. 2010) ("[I]tems such as newspaper articles, commentaries and editorial cartoons are not  
[written instruments] properly incorporated into the complaint by reference.) (internal quotations  
omitted); see also *Hernandez v. Smith*, ("[Plaintiff] must identify (cite to) the exhibits with  
specificity and may not rely on the Court to wade through the exhibits and piece together his  
claims.").

<sup>5</sup> Defendants' request for judicial notice is denied as moot because the Court did not consider the  
documents they submitted in ruling on this motion.

1 **C13-01569 HRL Notice will be electronically mailed to:**

2 Shaudee Navid snavid@reedsmith.com, navakian@reedsmith.com, rkassabian@reedsmith.com

3 Tuan V. Uong Tuong@reedsmith.com, vhramirez@reedsmith.com

4 **C13-01569 HRL Notice will be mailed to:**

5 Sherry Melinda Vincent  
1385 Whitehurst Court  
6 San Jose, CA 95125

7 **Counsel are responsible for distributing copies of this document to co-counsel who have not**  
8 **registered for e-filing under the court's CM/ECF program.**

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